

NTSB Order No. EA-4282

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

Respondent .

Docket SE-13159

¹The order is attached. At the sanction hearing on January 3, 1994, the law judge denied a motion by respondent to reconsider his prior order. Tr. at 31-33.

the undisputed facts showed a violation of 14 C.F.R. 91.13(a), as alleged by the Administrator.² We deny the appeal.

The Administrator's complaint alleged, in part:

2. On or about August 28, 1992, you acted as pilot-in-command of Civil Aircraft N82BF, a Beech Bonanza Model BE-A36, the property of another, on a passenger carrying flight near Reece, Kansas.

3. Incident to this flight, you landed off-airport in a pasture, an unimproved area.

4. Upon attempting to take off from this pasture, N82BF struck a barbed wire fence located alongside the pasture.

Respondent's answer to the complaint denied paragraphs 3 and 4.

Attached to the Administrator's motion for summary judgment was a letter from respondent to the FAA dated September 25, 1992.³ Respondent's letter included the following description of the takeoff:

While rolling in progress for takeoff, I was just about to rotate the airplane off the ground and I observed a two strand barb wire fence in front of me, hidden by tall grass.

By the time I observed the fence, it was too late to stop the airplane or get off the ground.

The airplane went through the fence causing minor damage to the leading edge of the left and right wing and propeller. We were able to ferry the airplane back to Wichita.

²§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The Administrator alleged that respondent had acted carelessly.

The summary judgment was partial in that a hearing was scheduled on the question of the propriety of the 30-day suspension of respondent's airman certificate proposed by the Administrator.

³This was prior to issuance of the Order of Suspension on May 25, 1993.

In response to the motion for summary judgment, respondent offered an affidavit. That document (dated September 28, 1993) included the following:

4. I landed the aircraft at the site indicated without incident. The area was indeed smooth and level. The area was covered by tall grass and appeared to be in need of mowing.

5. As indicated in my letter of September 25, 1992, we exited the aircraft after landing. I could see nothing that constituted a danger to persons or property either for the landing that I had just made or for the anticipated take off.

6. After the property was viewed for a time, we got back in the aircraft and I back taxied along the strip upon which I had previously landed. I then reversed the aircraft, made my preflight, checked the area including the sky, and determined that take off could be made in a safe manner. I accelerated the aircraft and the hidden obstruction appeared.⁴ I took such evasive action as previously reported and there was minimal damage to the aircraft and no injury to the occupants.

We agree with the law judge that the admitted facts (in the form of statements from respondent) warranted granting the Administrator's motion and finding that respondent had been careless. We are not persuaded by respondent's claim (made here and before the law judge) that, because his answer denied key facts, a hearing on the facts was required. We will not require our law judge to ignore facts admitted on this record.⁵ In any

⁴The hidden obstruction was the barbed wire fence and metal fencepost. See letter of September 25, 1992 and Tr. at 14. It was apparently hidden in the tall grass.

⁵There might be some theoretical due process concern in considering the September 1992 letter because it was sent before the answer (which contained a general denial of the allegations), but any misgivings dissolve with respondent's incorporation of that letter in his September 28, 1993 affidavit.

case, respondent's reply to the motion for summary judgment indicates that his answer's denials were immaterial to the facts necessary to support the violation and, thus, immaterial to whether summary judgment was appropriate.⁶

Respondent did not see the wire or fencepost and did not know they were there. In taking off as he did, he failed to take steps to ensure that his path was clear. He had not inspected the entire area (Tr. at 22) and there was considerable tall grass. In failing to take basic precautions, respondent failed in his duty of care, violating § 91.13(a). He may not avoid his duty as pilot-in-command by relying on the advice of a passenger,⁷ and in the case of this takeoff, there is nothing to suggest that respondent was in any way constrained from making a full inspection of the takeoff area. Respondent took a risk in failing to do so, and that risk endangered his passenger, the aircraft, and himself. The issues respondent raises regarding the circumstances at the scene and his relationship with the passenger relate, if at all, to possible mitigation of the sanction amount, rather than to dismissal of the charge, and respondent has not appealed the law judge's affirmance of the

⁶E.g., the denial of ¶ 3 was intended to put in issue whether or not the landing was in an "unimproved area" or could properly be called a "pasture." Reply at 2. At the hearing, respondent made no attempt to amend the factual recitations in his letter and affidavit, thus confirming the propriety of their use, despite the answer's denials, in deciding the motion for summary judgment.

⁷See Administrator v. Bell, 1 NTSB 1960 (1972); Administrator v. Harrington, NTSB Order EA-3767 (1993) at 10.

Administrator's proposed 30-day suspension.

Finally, respondent argues that there was no "potential endangerment," so as to implicate § 91.13(a). The facts belie such a contention. Moreover, the admitted facts establish that actual damage was caused the aircraft, thus satisfying § 91.13(a) in that respondent created a potential endangerment that was realized. There was no genuine issue of material fact and the Administrator was entitled to partial summary judgment as a matter of law.⁸

Respondent also contends that the law judge demonstrated bias and a preconceived notion of respondent's guilt, and that he should have recused himself. We are not persuaded by respondent's quotes from the hearing transcript. At the time of the hearing, the law judge had already ruled on the motion for summary judgment, and at the quoted points of the hearing, had also denied respondent's request for reconsideration of that order. The law judge was simply commenting on his view of respondent's behavior, based on the facts already established on the record. To the extent the law judge was offering general comments and advice about respondent's behavior, we can see no

⁸Respondent focuses considerable attention on his landing and justifying that landing as a careful and prudent one. The merits of respondent's landing are not a compelling defense in the matter of his later takeoff. That is, it is not a convincing answer here to say that, because he landed safely, he can assume that he can take off safely. That he landed safely may only have been fortuitous, in light of the hidden obstructions. Moreover, and in any case, counsel for the Administrator advised the law judge at the hearing that his concern in this case "was with the takeoff." Tr. at 24.

error in his courteous yet critical remarks.⁹ The law judge's statements on page 59 of the transcript, where he mentions recusal, refer simply to his belief that, were this Board to reverse his grant of summary judgment, a different law judge should preside on remand. These statements do not warrant reversal of the law judge's order or further proceedings.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.¹⁰

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

⁹See Action for Children's Television v. FCC, 564 F.2d 458, 471 (D.C. Cir. 1977) at footnote 22 (agency may bring its own experience and expertise to bear in its decisionmaking).

¹⁰For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).